



D'Souza & 2 others v Khansa Developers Limited & another (Civil Suit E005 of 2024) [2025] KEELC 1010 (KLR) (5 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1010 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT E005 OF 2024
SM KIBUNJA, J
MARCH 5, 2025**

BETWEEN

**MARIA FELICIDADE BRIGIDA D'SOUZA 1ST PLAINTIFF
NEVILLE STEPHEN D'SOUZA 2ND PLAINTIFF
ANGELINA D'SOUZA 3RD PLAINTIFF**

AND

**KHANSA DEVELOPERS LIMITED 1ST DEFENDANT
COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT**

RULING

Notice of Motion Dated 18th July 2024

1. The Plaintiffs filed the application dated 18th July 2024, that is brought under sections 1A, 1B, 3 and 63 of the *Civil Procedure Act*, Order 18 Rule 11 and Order 51 Rule 1 of the *Civil Procedure Rules 2010*, seeking for inter alia orders:
 - a. That this Honourable Court be pleased to order that a site visit be conducted on all that property known as Mombasa/ Block XXI/143 to ascertain its factual status.
 - b. That costs of the Application be provided for.

The application is based on the eight (8) grounds on its face marked (a) to (h) and supported by the affidavit of Angelina D'souza sworn on 18th July 2024, in which she inter alia deposed that a section of the plaintiffs' land, Mombasa Block XXI/143, has developed extensive cracks as a result of the construction of a multi-storey building by the 1st Defendant; that the plaintiffs' report as prepared by Eng. Duilio Peter Musau showed that the cracks were as a result of settlement and re-adjustment of the 1st defendant's multi-storey development; that the court needs to conduct a site visit on the



suit property to ascertain the extent of the damage on the Plaintiff's premises; the proximity of the 1st Defendant building and that of the Plaintiffs; the excavation by the 1st Defendant of the Plaintiffs' premises' foundation that resulted to the demolition of the Plaintiffs parameter wall and toilets; and to help the court to better understand the expert evidence filed by the parties herein; that as the plaintiffs are planning to rebuild their house and it is paramount for the court to assess the damage for them to commence construction after the site visit.

2. The application is opposed by the 1st defendant, through the replying affidavit of Sammy Kamuio Mukuri, sworn on 23rd July 2024, in which he inter alia deposed that the plaintiffs had in their plaint averred that they are no longer living in the building since it has been condemned; that as such, there is no need for the court to visit the locus in quo to ascertain the damage since a condemned building means it will have to be pulled down, or substantially reconstructed; that there was no need for the court to do a site visit since the plaintiffs ought to have demonstrated the proximity of their building to the 1st defendant's development in their plaint and supporting pleadings; that there would be experts who would be available to testify hence no need for the court to conduct a site visit; that it was not up to the court to seek facts on its own but rather, the plaintiff who had the burden of proof to prove what they allege; that the proposed site visit would not assist in the just and effectual determination of this suit, but would instead be a costly, and unnecessary waste of judicial time; that if the applicants were seeking to reinstating the condemned building, it was not up to the court to arrive at the expected costs, but for them to plead the costs; that the application should therefore be dismissed with costs.
3. The plaintiffs filed a supplementary affidavit sworn by Angelina D'Souza on the 29th July 2024, inter alia deposing that the mere fact that their building has been condemned and cracks extending to their other buildings is reason enough for the court to visit the locus to assess the circumstances leading to the condemnation, proximity to the parties' buildings, extent of the damage to the buildings that have not been condemned; safety measures taken by the 1st respondent to protect the applicants; that the locus is about a kilometer from the court premises and a visit will be in the best interest of administration of justice.
4. That pursuant to the directions of 29th October 2024, and 2nd December 2024, the learned counsel for the plaintiffs and 1st defendant filed their submissions dated the 30th August 2024 and 3rd February 2025 respectively, which the court has considered.
5. The following are the issues for determinations by the court:
 - a. Whether the plaintiffs have made out a reasonable case for the court to visit the locus at this stage.
 - b. Who pays the costs?
6. The court has carefully considered the grounds on the application, the affidavit evidence by both sides, submissions by the two counsel, superior courts decisions cited thereon, and come to the following findings:
 - a. The power to conduct site visit is enshrined in Order 18 Rule 11 of the [Civil Procedure Rules](#) which provide that:

“ The court may at any stage of a suit inspect any property or thing concerning which any question may arise.”

The plaintiffs have urged the court to visit the site to see and observe among others, the extent of the damage on their premises, the proximity of the 1st Defendant's building and theirs,



and the excavation by the 1st Defendant's foundation, which resulted in the demolition of their parameter wall and toilets. They posit that the site visit would assist the court to better understand the expert evidence filed by the parties herein.

- b. The plaintiffs have claimed that a section of their land, Mombasa Block XXI/143, has developed extensive cracks as a result of the construction of a multi-storey building by the 1st defendant. They have attached a report prepared by Eng. Duilio Peter Musau to show that the cracks were as a result of settlement and re-adjustment of the 1st defendant's multi-storey development. In the case of *Masila versus Ndolo* (Environmental and Land Originating Summons E003 of 2022) [2023] KEELC 21474 (KLR) (1 November 2023) (Ruling) the court held;

“The purpose of a visit of the locus in quo was explained in Ugandan case of E. Kangye v E. Bwana Kampala HCCS No. 38 of 1989 in which Ouma, J expressed himself as follows:

“The law relating to visiting locus quo, is well settled. It is to enable witnesses clarify what they have stated in court and must do so on path... When the court goes to the locus quo it goes to check on the evidence given in court, and not fill in gaps. If trial court had to fill in gaps, it would run the risk of being a witness in the case, which should be avoided which did not happen in this case... the intention of visiting a locus in quo is to enable the court to clarify the evidence and to enable the court to form impressions or findings.”

Similarly, in the case of *Zziwa Ssalongo & Another v Kafumbe* High Court Kampala *CA no. 330 of 2012* it was held that:

“Visiting a locus in quo is not mandatory and depends on the circumstances of each case. In *Yeseri Waibi v Edisa Lusi Byandala* [1982] HCB it was held that the practice of visiting the locus in quo is to check on the evidence given by witnesses and not to fill the gap for them or [the] court may run the risk of making itself a witness in the case.”

A site visit can only be ordered in special circumstances. There should be special circumstances before a decision to visit the locus in quo is made. A visit to the locus in quo is the exception rather than the rule. Its purpose is primarily to make the Court understand the nature of evidence adduced by the parties rather than to collect missing evidence. The court must feel that adequate material has been placed before it to show that it is in the interest of justice to visit the locus in quo.”

If the court were to visit the suit property as sought by the plaintiffs at this stage, it would do so and proceed to receive evidence, before appreciating the nature of the factual evidence to be presented by the contesting parties during the hearing. The court should not visit the locus before a reasonable basis for the visit has been made through the factual evidence presented before it.

- c. The issues the plaintiffs desires the court to deal with during the visit to the locus, including to observe the proximity of its buildings to the 1st defendant's construction, the depth of the 1st defendant's excavation and the cracks on their buildings caused by the said excavation, are in my view matters that can better be captured in reports by appropriate experts, that are filed



and served on the other party. The experts would then be availed in court as witnesses to speak on their observations and conclusions, produce their reports and be cross-examined by the other party's counsel. The report dated 25th November 2023 that was prepared by Eng. Duilio Musau, that inter alia state that the cracks started appearing sometime in November 2021, when the 1st defendant began the construction, and that site investigation was undertaken which determined the underlying causes of the cracks in the suit property, is already on record. If the plaintiffs believe they need to file and serve further experts reports that addresses issues not covered by those already filed, then recourse is in moving the court for leave to do so but not to ask the court to be part of the parties collecting and collating evidence to be used for or against any of the parties in the suit.

- d. As the hearing of the main suit is yet to commence, I find the plaintiffs have not made out a reasonable case for the court to visit the locus at this stage. The application is therefore premature as the issues required to be observed during a site visit are required to crystallize during the giving of evidence in the main suit to enable parties and the court to appreciate whether there was need for the a site visit.
 - e. Under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya costs follow the event unless ordered otherwise for good cause. In the instant application, I find it fair and just that the costs in the application be in the cause, though the plaintiffs have failed in their quest.
7. In view of the foregoing determinations, the court finds and orders as follows:
- a. That the plaintiffs' notice of motion dated 18th July 2024 is without merit.
 - b. That the said application is dismissed.
 - c. Costs be in the cause.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF MARCH 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the Presence of:

Plaintiffs : No appearance

Defendants : Mr Makau for the 1st Defendant

Shitemi – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

